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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 393

GERALD G. BARRY AND GEORGIANA G. BARRY,
Petitioners,

vs.

CHRYSLER CORPORATION, CHRYSLER SALES CORPORATION, CHRYSLER MOTOR PARTS CORPORATION, CHRYSLER ILLINOIS COMPANY, DODGE BROTHERS CORPORATION, AND BUDD WHEEL COMPANY,
Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

FRANK PARKER DAVIS,
ARTHUR C. BEAUMONT,
Counsel for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

We deem it quite unnecessary to reply to this petition *in extenso*. We cannot discover in the fifty-odd printed pages any clear-cut ground for review by this Court. None of the reasons of the rule (Rule 38) exists nor any other to be found in opinions of this Court in patent cases where the writ has been granted. The petition appears to us to consist mainly of a jumble of generalities together with rather serious charges of dereliction of duty on the part of the judiciary of the Seventh Circuit. Examination of the

record in the instant case, or in the prior case of these petitioners against The Studebaker Corporation, *et al.*, will show that these charges are wholly unjustified; also that the petition is peppered with wholly erroneous statements concerning defendants' position and what was before the Courts on their behalf. We deem it unnecessary to point out specifically the numerous statements of this character,—the baselessness whereof will be quite apparent.

The frame of the petition is such as not even to give a very clear explanation of the history of the litigation so we think it may be well for us to state the same succinctly.

The Complaint in the instant case was filed shortly after a similar Complaint had been filed against The Studebaker Corporation, *et al.*, and remained in a state of suspension pending the outcome of the latter. The Studebaker case went to trial before Judge Wilkerson who found for defendants on both issues of validity and infringement.* On appeal his decree of dismissal for want of equity was affirmed, more particularly upon the issue of validity (111 F. (2d) 400). The opinion on appeal (Circuit Judges Major, Treanor and Kerner), after painstaking exposition of the nature of the disclosure of the patent in suit, and of the accused constructions, followed by detailed analysis of a number of prior art patents, concluded as follows:

> "If the Barry patent is broad enough to read upon defendants' structure, which is of the single metal stamping type, we think it is clearly anticipated by the prior art of Smith and Olsen.
>
> "In view of the prior art disclosed in the various patents, we conclude that claims 5, 6, 7 and 9 of the Barry patent in suit involve neither originality nor novelty in the art and are invalid for want of invention."

* The transcript brought up is incomplete. It unwarrantedly omits Judge Wilkerson's findings of fact and conclusions of law and decree, also the opinion on appeal; and even the file history of the patent in suit, Plaintiffs' Exhibit No. 3; all of which were in the printed transcript below.

Petition for rehearing was denied.

In the instant case the same claims were specified as in the Studebaker case and two of the three accused structures were identical with those accused in the Studebaker case. A third structure differed slightly from one of these two.

The issues in the instant case were settled at a pre-trial conference as follows:

> "1. Validity of claims 5, 6, 7 and 9 of the patent in suit.
>
> "2. Infringement of claims 5 and 6 by wheel construction exemplified by Defendants' Interrogatory Exhibit No. 2.
>
> "3. Infringement of claims 7 and 9 by each of wheel constructions exemplified respectively by Plaintiffs' Exhibit B, Defendants' Interrogatory Exhibit No. 1, and Defendants' Interrogatory Exhibit No. 2.
>
> "4. Applicability of rule of *stare decisis* by reason of claims 5, 6, 7 and 9 of the patent in suit having been held to be invalid in the suit of these plaintiffs against The Studebaker Corporation, *et al.*, No. 15,265 in this Court and No. 6961 in the Court of Appeals of this Circuit." (Trans. Rec. p. 25.)

The case went to trial before Judge Barnes, who did not rule upon the stated issue of applicability of the rule of *stare decisis*, or upon the issue of validity, but confined his opinion to the issue of infringement upon which he held against plaintiff. (Tr. Rec. 238; 49 U. S. P. Q. 445.)

Upon appeal in the instant case the judgment was affirmed (Circuit Judges Evans and Kerner, and District Judge Lindley), the opinion, having reference to the preceding case, reading:

> "We have re-examined the record in that cause and carefully scrutinized the one presented here. Plaintiffs relied upon the same claims in each cause; they offered the testimony of the same patent expert substantially to the same effect in each. The same prior

art was presented. So far as validity is in controversy the records are substantially identical.

"Plaintiffs assert at great length that both the District Court and this court were wrong in the prior case, and attempt now to relitigate the issue of validity. Careful examination of the patent, in the light of Lefler, 775,831; Johnston and Kraner, 1,382,089; Olsen, 1,213,241; Parker, 1,294,825; Smith, 1,347,183; Baker, 1,123,065; Phipps, 735,812 and Custer 1,150,103 is convincing that we were not in error in our previous decision. We adopt the analysis made by Judge Treanor and agree that no originality or novelty is disclosed in the claims relied upon." (Tr. Rec. 321; 128 F. (2d) 618.)

Thus the cause of action has had the attention and scrutiny of two judges holding District Court (Judges Wilkerson and Barnes), and five judges on appeal,—four circuit judges (Judges Evans, Major, Treanor and Kerner who sat on both appeals) and another district judge (Judge Lindley),—seven in all, with decisions in every instance against petitioners and no dissent by any appellate judge.

There is nothing exceptional about this litigation,—save perhaps the persistence of petitioners in their attempt to re-litigate precisely the same issues that had already been decided against them by the same Courts,—and it must be perfectly self-evident that no unsettled question of law is involved.

Basically the litigation is merely ordinary patent infringement litigation with the usual issues of validity and infringement. There is present no question of public interest. It is merely a private controversy which has no element about it whatever to suggest a reason for issuance of the writ prayed for, or which even justifies this Court's being burdened with consideration of a petition for the writ.

The petition is merely the wail of a defeated litigant and an embittered lawyer-patentee who cannot or will not

see that his purported invention did not entitle him to a monopoly of any such scope as that contended for. He does not understand, or perversely will not recognize, that the presumption of validity attending the grant of letters patent is rebuttable by showing a prior state of the art overlooked by the Patent Office when granting him such claims as those declared upon.

We submit in conclusion that the petition is wholly without merit and should be denied.

Respectfully submitted,

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ARTHUR C. BEAUMONT,
Counsel for Respondents.